87-116

No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1986

JESUS MARIA OCHOA, *Petitioner*

v

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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(I)

QUESTION PRESENTED

Whether the limited detention approved in *Terry* v. *Ohio* permits a full blow, warrantless arrest based upon the so-called "drug courier profile".

(a)

Whether the so-called "drug courier profile" applies to the stop of a suspect in a metropolitan area when neither the locus of the stop nor facts known to the police are related to a travel point, *i.e.*, an airport or train station.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO.

JESUS MARIA OCHOA, PETITIONER

V.

UNITED STATES OF AMERICAN, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 25, 1987.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not reported. It is reproduced in the Appendix (App. 2a - 3a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1987. A timely Petition for Rehearing was denied on April 29, 1987 (App. 4a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On July 19, 1985, the Petitioner was indicted under 21 U.S.C. §841(a)(1) (possession of cocaine with intent to distribute).[1] His pretrial motions to suppress were denied and trial was had before a jury in the United States District Court for the Central District of California. On October 11, 1985, the jury returned a verdict of guilty as charged. However, the Petitioner's motion for new trial was granted and he was retried, his pretrial motions to suppress having been denied. The jury returned a verdict of guilty as charged in the second trial. The Petitioner was sentenced to 10 years incarceration and ordered to pay a $50,000 fine. He then appealed to the United States Court of Appeals for the Ninth Circuit. The trial

[1] Counsel for Petitioner does not yet have access to the transcript of the pretrial motions or trial. These facts are compiled from Excerpts of the Record.

court's evidentiary rulings and the jury's verdict were affirmed in a Memorandum Opinion on March 25, 1987. (App. 2a - 3a). The Petitioner's petition for rehearing was denied on April 29, 1987. (App. 4a).

The evidence at trial showed that on July 8, 1985, the Petitioner checked into the Westin Southcoast Plaza Hotel in Santa Ana, California. A driver's license and business card were produced for identification. A credit card was also presented, which was later authorized to a limit of one thousand dollars. All of these were in the Petitioner's own name. Later that day a Mr. Giraldo attempted to check in without a reservation. As there were no rooms available, he returned later to check in. There was no apparent connection between the two men. An employee of the hotel called the Santa Ana police because the two men were from Miami, had no reservations and may have fit a police "profile". [2] Hotel employees testified that the Petitioner was not going to pay cash and had a considerable amount of luggage, while the police testimony was to the contrary. There is also a question as to whether the Petitioner had called for reservations prior to checking in. A combined Santa Ana Police Department and D.E.A. surveillance was initiated.

The next morning, at approximately 6:35 a.m., police observed the Petitioner arrive at the hotel in a white Cougar. He

---

[2] The Santa Ana Police had distributed a "Crime Alert" to hotels and motels in the area which presented a "profile" of drug traffickers and requesting cooperation. (App. 20a - 23a).

later drove across the street to the South Coast Plaza Shopping Mall. He entered the mall and went to a group of pay phones where he made several calls. Although one officer testified that the Petitioner appeared to have a beeper, no beeper was ever recovered. The Petitioner went back to the Cougar and returned to the hotel. At about this time two male Latins arrived in a silver Chrysler. At about 10:55 they left the Westin in the Chrysler and drove to the shopping mall. The Petitioner drove his Cougar to the mall, where he was seen in a coffee shop with the two males. There they were joined by a fourth man, Ivan Galindo. No money or packages changed hands. After about 10 minutes, the four men left the coffee shop and walked around the mall, looking around as they walked.

The Petitioner and one of the other males left the mall after 30-40 minutes and went to the silver Chrysler. The Petitioner drove this vehicle to the Sears store in the shopping mall.

The Petitioner briefly opened the trunk to the Chrysler. The two separated and Petitioner went into the Sears store. The Petitioner later left the Sears store and drove the Chrysler to another part of the shopping center parking lot. He parked the Chrysler next to a brown Audi. He exited the Chrysler, looked around and walked to the Audi. The Petitioner then removed two gift wrapped boxes from the Audi and placed them in the trunk of the Chrysler. At this point he was approached by the police. He was arrested and the two boxes seized. Pursuant to a pat down search, keys to the Audi were found. The keys to the Chrysler were in the Petitioner's hand. The police used these keys to remove the boxes from the Chrysler.

Some hours after the seizure of these boxes, a narcotics-sniffing canine is said to have "alerted" to them indicating the possible presence of a controlled substance.

Nine and one-half hours later, a search warrant was obtained for the two boxes, which were found to contain approximately 20 kilograms of cocaine.

The Petitioner filed a pretrial motion to suppress all physical evidence obtained as a result of his arrest. The trial court denied this motion. (App. 5a - 9a). Petitioner was convicted and sentenced to 10 years incarceration. The Petitioner then appealed to the Ninth Circuit Court of Appeals, where the decision of the trial court was affirmed. *U.S.A.* v. *Jesus Maria Ochoa,* No. 86-5132 (9th Cir. C.A. March 25, 1987) (mem.) The Petitioner's timely petition for rehearing was denied April 29, 1987.

REASONS FOR GRANTING THE PETITION

This case presents the important and recurring question regarding the circumstances under which a warrantless arrest is proper within the terms of the United States Constitution. The Fourth Amendment mandates that searches and seizures be supported by a warrant issued upon probable cause. Although certain exceptions to the warrant requirement have been fashioned by this Court, such exceptions are subject to strict scrutiny. In *Illinois* v. *Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983) this Court reiterated the Fourth Amendment's strong preference for searches conducted pursuant to a warrant, quoting as its rationale that "[t]he essential protection of the

warrant requirement . . . is in 'requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' " 462 U.S. 213, 240, quoting *Johnson* v. *United States,* 333 U.S. 10, 13-14 (1948).

Although a warrantless arrest may be appropriate under some exception to the warrant requirement, there are no exceptions to the Constitutional mandate that all arrests be supported by probable cause. In *Illinois* v. *Gates, supra,* this court enunciated the standard for determining whether probable cause exists: under the totality of the circumstances, would a reasonable person be justified in believing criminal activity was occurring or about to occur? 462 U.S. 213, 230. Only then is a "seizure" proper.

Something less than probable cause may permit a limited, investigatory stop. In *Terry* v. *Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968), this Court held that police may involuntarily restrain an individual on less than probable cause if the officer has reasonable objective grounds to believe that the person has committed or is about to commit a crime. Such a reasonable suspicion warrants only a temporary seizure for the purpose of questioning limited to the purpose of the stop. *U.S.* v. *Brignoni-Ponce,* 422 U.S. 873, 95 St.Ct. 2574 (1975). Any stop of a more intrusive nature becomes a full-blown arrest requiring probable cause. As this Court made clear in *Dunaway* v. *New York,* 442 U.S. 200, 99 S.Ct. 2248 (1979), *Terry* and its progeny created only limited exceptions to the general rule that the seizure of a person be supported by

probable cause.

The principles enunciated in *Terry* have led to a line of cases based on the so-called "drug courier" profile. Such cases involve the detention of a person at an airport or train station based on a series of characteristics police have come to associate with one who may be transporting narcotics.

In *Reid* v. *Georgia,* 448 U.S. 436, 100 S.Ct. 2752 (1980) and *Florida* v. *Royer,* 460 U.S. 491, 103 S.Ct. 1319 (1983), this Court recognized that police may conduct a limited investigation by briefly detaining an individual who matches the "drug courier" profile:

> The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officers suspicion in a short period of time.

Florida v. *Royer,* 460 U.S. 491, 500-501.

Should the detention become so intrusive as to rise to the level of a "seizure" — arrest within the meaning of the Fourth Amendment — the police must have probable cause to continue. In the present case, the government does not dispute the fact that the Petitioner was arrested in the parking lot of the shopping mall. However, the government claims that this arrest was supported by probable cause based on the information supplied by hotel personnel and subsequent police

investigation. This Court has never permitted even a limited *Terry* stop under the thin information regarding only innocent activity supplied to the police in this case. The subsequent investigation failed to raise this case to the level required under *Terry,* much less amounting to probable cause.

In denying the Petitioner's motion to suppress, the trial court relied upon the hotel employee's tip and subsequent police investigation as indicating that the Petitioner's activities were characteristic of a drug courier. As to the tip comporting with the profile, the trial court stated:

> It was the hotel that brought the matter to the attention of the police, the hotel person said, we have two people here who meet the criteria, they come from Florida, they are Latin, they checked in here without reservations and without luggage. . .

(App. 5a).

The Court also found that police surveillance turned up evidence that matched the profile — the Petitioner used a public phone although he had access to a private phone, used a beeper and engaged in "anti-surveillance" techniques. (App. 6a - 8a).

The Petitioner contends that the drug courier profile has no bearing in a non-airport situation. The profile, by definition, is applicable only in cases where the defendant is in or near a place of public ingress and egress — a place where drugs are normally transported. Justice Powell, in his concurring opinion in *Florida* v. *Royer,* referred to "the extent to which air transportation is used in drug traffic." 460 U.S. 491, 508. As this Court indicated in *Royer,* the elements of the profile

demand an airport-train station scenario:

> We agree with the State that when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers — paying cash for a one-way ticket, the mode of checking the two bags, and Royer's appearance and conduct in general — were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention.

460 U.S. 491, 502. As these facts indicate, the very nature of the profile requires the ability to travel in a short period of time to or from a source city. Otherwise, *any* hotel guest or driver or passenger in an automobile could be suspected of transporting narcotics.

Assuming, *arguendo,* that the "drug courier" profile is applicable in this case, the characteristics exhibited by the Petitioner did not bear such a resemblance to the profile as to permit even an investigatory stop, much less a full blown arrest. Moreover, this Court has repeatedly rejected the notion that one who matches the characteristics of a drug courier, without more, is subject to a full arrest.

The seminal case involving the drug courier profile is *Reid* v. *Georgia,* 448 U.S. 436, 100 S.Ct. 2752 (1980). In *Reid,* the defendant arrived at the Atlanta airport on a commercial flight from Ft. Lauderdale, Florida, a known narcotics distribution point. A D.E.A. agent observed the defendant disembark alone, although he was closely followed by another man carrying a matching shoulder bag. The defendant looked backwards several times in the direction of the second man.

When the two reached the main lobby of the terminal, they met and spoke briefly, then left the terminal together. The D.E.A. agent approached the two outside the terminal and identified himself. The two, behaving in a nervous manner, produced airline tickets and identification pursuant to the agent's request. The tickets indicated that they had stayed in Ft. Lauderdale only one day. The D.E.A. agent testified that the defendant agreed to return to the terminal and permit a search of the shoulder bags. However, he then ran off, abandoning his shoulder bag. 448 U.S. 438, 439-440. This Court rejected the appellate court's finding that the D.E.A. agent could reasonably suspect that the defendant was engaged in criminal activity based on the drug courier profile:

> Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure. Nor can we agree, on this record, that the manner in which the petitioner and his companion walked through the airport reasonably could have led the agent to suspect them of wrongdoing. Although there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, this is not such a case. The agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an "inchoate and unparticularized suspicion or 'hunch' " than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.

448 U.S. 438, 441, quoting *Terry* v. *Ohio,* 392 U.S. 27, 88

S.Ct. 1868 (1968).

The line of cases following *Reid* indicates that this Court and the lower courts have refused to attach undue significance to the profile because the elements are often of a nonincriminating nature when taken alone or in combination. In cases in which a *Terry* stop or full arrest have been upheld under the drug courier profile, the court also considered incriminating evidence known to the police.

In *Florida* v. *Royer,* 460 U.S. 491, 100 S.Ct., 1319 (1983), the defendant purchased a one-way airline ticket to New York City at Miami International Airport under an assumed name. He checked two suitcases with identification tags bearing the same assumed name. The defendant then was approached by two detectives who believed he fit the drug courier profile. Pursuant to their request, the defendant produced his airline ticket and driver's license, both bearing his correct name. He explained the discrepancy in names by saying that the ticket was purchased by a friend. The officers identified themselves and, retaining the driver's license and tickets, brought the defendant to a small room. The defendant produced a key and unlocked a suitcase in which marijuana was found. This Court held, *inter alia,* that the initial detention of the defendant for questioning was permissible under *Terry* v. *Ohio, supra.* Once the defendant was taken out of the public area and into the small office, he was under arrest and probable cause being absent, the arrest was illegal. 460 U.S. 491, 500-501.

Since *Reid* and *Royer,* the courts have consistently avoided attaching undue significance to the drug courier

profile. In *Moya* v. *United States*, 745 F.2d 1044 (7th Cir. 1984) (on remand), the defendant was approached in the taxicab line outside the airport. The officers knew that the defendant had arrived from Miami with only carry-on luggage, observed him scanning the crowd, and looking over his shoulder and had engaged in some suspicious activity in a washroom stall. 745 F.2d at 1048. The *Moya* court began its analysis by stating "[w]e must be especially cautious when the evidence that is alleged to establish probable cause is entirely consistent with innocent behavior." *Id.* The court found that this information was an insufficient basis even for the suspicion that the defendant was carrying contraband. *Id.* The following events occured after the defendant was approached in the taxicab line: the defendant when first asked for identification stated that he had none, then produced a driver's license; while reaching for the identification, he exposed a plastic bag, then denied its existence. The court concluded that even the defendant's dishonesty did not give rise to probable cause to believe that he was engaged in criminal activity. *Id.* *See also U.S.* v. *Saperstein*, 723 F.2d 1221 (6th Cir. 1983).

In the instant case, the evidence cited by the trial court in upholding the warrantless arrest cannot by any interpretation justify so much as a *Terry* stop. (App. 5a - 9a). The court was impressed because the informant's tip included the fact that the Petitioner was from Florida, was Latin and checked into the hotel without reservations and without luggage. The court also stated that "the fact that they [the Petitioner and Giraldo] may have had luggage is not really relevant, it is what the police believed and what they were told." (App. 5a) The tip itself

cannot by any interpretation justify a *Terry-Royer* type stop, much less the full arrest that actually occurred. The Petitioner checked into a hotel — no airport or train station was involved. Valid identification was presented, as well as a business card. There was nothing unusual or incriminating about this procedure. That the Petitioner's identification indicated he was from Miami, Florida is insignificant since the vast majority of Florida residents have no involvement in the drug trade. There was a dispute as to whether the Petitioner had luggage, but even if one believes he did not, this too is a nonincriminating detail — the luggage could be in the car or perhaps the Petitioner intended on staying only one night.

The trial court also relied on the police surveillance, noting that the Petitioner was a Florida resident, and had access to three vehicles in the area (App. 6a). Unusual perhaps, but does this indicate that one is a drug courier? Whether a person is out of town on business or pleasure, it is reasonable that he would have friends, relatives or business associates in the area he is visiting and that they too have automobiles. The Petitioner's use of the public phones was also seen as incriminating because he had a phone in his hotel room. There was no evidence to suggest that the Petitioner avoided the use of his hotel phone in favor of the pay phone, but only that he chose to use a public phone at one point in time. The court mentioned the beeper, but no beeper was recovered from the Petitioner. Moreover, many legitimate business people rely on beepers for lawful purposes. The "erratic" driving in the shopping center parking lot was also cited; again, this suggests nothing of an incriminating nature and could very well be the

behavior of one who is in unfamiliar surroundings.[3] None of these facts, viewed singly or as a whole, support a reasonable suspicion that the Petitioner was acting as a drug courier. Moreover, as this Court noted in *Reid* v. *Georgia,* 448 U.S. 438 S.Ct. 2752, the drug courier profile is merely "a somewhat informal compilation of characteristics believed to be typical of persons carrying narcotics." 448 U.S. at 440. To justify a warrantless arrest, however, it is the specific facts of a particular case which control and not the incantation of the word "profile." *Id.* Neither a *Terry* stop nor a full arrest were warranted under these facts. Therefore, under the doctrine of *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407 (1963), the contents of the packages seized should be suppressed as fruits of this illegal arrest.

The trial court relied on the *Gates* "totality of the circumstances" test in finding that the police had probable cause to arrest the Petitioner. (App. 9a). A comparison of the facts in *Illinois* v. *Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983) to those in the instant case mandates a different result. In *Gates,* the police received a highly detailed letter from an anonymous informant which stated exactly where, when and how the defendants were travelling. More specifically, the letter provided incriminating details of criminal activity: Mrs. Gates would drive to Florida, have their car loaded with drugs, Mr.

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[3] It is noteworthy that the police investigation did not disclose how the Petitioner arrived in Santa Ana (*i.e.* by plane or by car), or if he flew, how he paid for his airfare.

Gates would fly to Florida to meet her and the two would then drive the car back to their home near Chicago. 462 U.S. 213, 225. The police were able to corroborate major portions of the tip: that Mr. Gates resided in the suburb indicated by the tip; that he had a reservation to fly to Florida on the date indicated by the tipster; that he did indeed make that flight and went to a hotel where his wife was registered and that the two drove together to Illinois in a car bearing their license plates. 462 U.S. 213, 226. Based on this information, a search warrant was obtained. *Id.*

This Court found that the search warrant was supported by probable cause because the independent police investigation corroborated the informant's tip in so many respects. Furthermore, the anonymous letter was found to be reliable because it was corroborated in major part:

> The showing of probable cause in the present case was fully as compelling as that in *Draper*. Even standing alone, the facts obtained through the independent investigation [of the police] at least suggested that the Gateses were involved in drug trafficking.
>
> * * * *
>
> In addition, the judge could rely on the anonymous letter, which had been corroborated in major part [by the police] . . . . . The corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true.

462 U.S. at 243-244 (citing *Draper* v. *United States,* 358 U.S.

307, 79 S.Ct. 329 (1959)).

In the present case, neither the tip nor the police surveillance rise to the level demanded by this Court in *Gates*. There is nothing to show that the informant ever gave the police reliable information in the past. The tip is sorely lacking in detail — only that the Petitioner presented Florida identification, was Latin and perhaps that he had little or no luggage. There was nothing of an incriminating character. The generalized nature of the tip should also be noted — there was no detail as in the *Gates* letter. Moreover, the police investigation cannot even be characterized as "corroboration". The surveillance which followed the tip did nothing to verify that information so as to make the tip reliable. As this Court noted in *Gates* "[b]ecause an informant is right about some things, he is probably right about other facts," *Illinois* v. *Gates*, 462 U.S. 213, 244, *quoting Spinelli* v. *United States*, 393 U.S. 410, 427, 89 S.Ct. 584, 594 (1969) (White, J., concurring) The investigation itself failed to suggest that the Petitioner was engaged in drug trafficking. Unlike the scenario presented in *Gates*, there was nothing incriminating in the Petitioner's behavior. Finally, the Petitioner points out that in *Gates*, a warrant was obtained prior to the search of the Gates' car and home, while in this case the police did not even attempt to obtain an arrest warrant. Cases involving warrantless searches and seizures have always been subject to stricter scrutiny. In *Gates*, this Court noted "the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Illinois* v. *Gates*, 462 U.S. 213, 236. The Petitioner contends that the lower courts erred in their

application of the "totality of the circumstances" test of probable cause set forth by this Court in *Gates* — by no stretch of the imagination do the facts of this case rise to that level.

The Petitioner also submits that the taint of his illegal arrest was not cured by the later issuance of a search warrant. (See App. 10a - 19a). *Compare, Segura* v. *United States,* 468 U.S. 796, 104 S.Ct. 3380 (1984). The warrant added nothing to the thin information upon which the officers based their illegal arrest. The "dog sniff" fails to cure the lack of probable cause for two reasons. First, the dog sniff was itself the fruit of illegal police conduct in that it was a direct result of the Petitioner's unlawful arrest. Secondly, the gift-wrapped packages were held for several hours before the dog sniff was conducted — an unreasonable detention under this Court's holding in *United States* v. *Place,* 462 U.S. 696, 103 S.Ct. 2637 (1983).

In *Place,* this Court held that the seizure of the personal property from a person's custody is subject to the same constitutional limits as the seizure of a person. In that case, the defendant's luggage was taken from him because he fit the characteristics of the drug courier profile. 462 U.S. 696, 699. The defendant was not arrested. The agents then subjected the bags to a dog sniff. The dog reacted positively to one bag but ambiguously to another. This process took 90 minutes. A search warrant was obtained for the bags several days later and cocaine was discovered.

This Court reiterated that the warrantless seizure of personal property is *per se* unreasonable within the meaning of the Fourth Amendment, subject to limited exceptions. 462

U.S. 696, 701. Among these exceptions is exigent circumstances — that the police have probable cause to believe the item contains contraband and may disappear before a warrant is obtained. *Id.* The *Place* court found that no such probable cause existed for the seizure of the luggage, but that a *Terry* type seizure was permissible:

> [W]e conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, *provided that the investigative detention is properly limited in scope.*

462 U.S. 696, 706 (emphasis added).

This Court stated that although a "dog sniff" may not be violative of the Fourth Amendment because it is so much less intrusive than a typical search, under the facts of that case the police conduct did exceed the permissible limits of a *Terry* investigative stop. The chief factor which led to this finding was the fact that the suspect's property was detained for an excessive length of time — ninety minutes. 462 U.S. 696, 709-710. In the instant case, the boxes were detained for several hours before the dog sniff was conducted. Under *Place*, this detention is grossly unreasonable so that the Motion to Suppress should have been granted on this ground as well. The warrant was not obtained until approximately nine and one-half hours after the dog sniff. This warrant was based on the illegal dog sniff and the information which the Petitioner has already established as incapable of any inference of criminal activity. (App. 10a - 19a). Thus, the affidavit for the

warrant being totally devoid of probable cause, the search warrant itself should have been quashed.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	
Plaintiff-Appellee	No. 86-5132
	D.C. No. CR 85-718 ER
v.	
	MEMORANDUM*
JESUS MARIA OCHOA,	
Defendant-Appellant	

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding
Argued and Submitted March 6, 1987
Pasadena, California

Before: REINHARDT and WRIGHT, Circuit Judges, and COPPLE, Senior District Judge**

The panel has concluded:

1) The trial court did not err in denying the Appellant's Motion to Suppress physical evidence and there was ample probable cause to arrest the Appellant.

2) The trial court did not err in allowing the Government to present evidence of "other bad acts" in the context of the indictment and trial. *United States* v. *Aleman,* 592 F.2d 881

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**The Honorable William P. Copple, Senior United States District Judge, District of Arizona, sitting by designation.

(5th Cir. 1979).

3) The trial court did not err in limiting defense counsel's right to cross-examine certain witnesses as to D.E.A. Form 202 because the content of that form was clearly hearsay. Federal Rule of Evidence 801.

4) The trial court did not err in allowing D.E.A. Agent Briggs to be qualified as an expert witness. It was well within the discretion of the trial court to allow the testimony. The agent was obviously qualified. *United States* v. *Fleischman,* 684 F.2d 1329, 1335 (9th Cir. 1983), *cert. den.* 469 U.S. 1044.

5) The trial court did not err in failing to give a lesser included offense instruction. In view of the quantity of cocaine involved there as no basis to support such an instruction *United States* v. *Silla,* 555 F.2d 703 (9th Cir. 1977).

6) The evidence produced in this case was more than adequate to support the verdict.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Date: April 29, 1987

UNITED STATES OF AMERICA,
PLAINTIFF,

vs. No. 86-5132

D.C. No. CR 85-718 ER

JESUS MARIA OCHOA,
DEFENDANT.

IT IS ORDERED:
Defendant's petition for rehearing is denied.

WM. P. COPPLE
United States District Judge

warrant, to conduct an arrest or a search with a warrant, then any benefit of the doubt, all indulgences are drawn against a finding of reasonableness on the part of that agent and his activities. And we would submit, your Honor, even though we do not believe this is a marginal case, but if the Court finds this is a doubtful case, we believe that the line should be drawn in favor of search warrants and against the warrantless arrest or the searches that took place in this case.

THE COURT: All right.

Well, the concept of probable cause is measured by what the officers knew at the time that they acted, whether or not that constituted sufficient probable cause in understood in the law to justify taking the actions that they did. The test is whether the information known to the agents was sufficient to warrant a prudent man to believe that the defendant was committing an offense.

The evidence in this case is — you've placed great emphasis on the profile evidence, it is true that profile evidence was resorted to by the hotel people, it had been provided to them earlier and they told them to look out for anybody who meets or fits the criteria shown on this attachment to that police alert, so-called. It was the hotel that brought the matter to the attention of the police, the hotel person said, we have two people here who meet the criteria, they come from Florida, they are Latin, they checked in here without reservations and without luggage, and that information was imparted to the police. The fact that they may have had luggage is not really relevant, it is what the police believed and what they were told.

Here, unlike the Fraitus case, where the agents relied

primarily on the information from an informant who was shown to be unreliable by the FBI's own investigation, reliance here was placed, with respect to those profile elements, was based on the statements made of citizen informants who are traditionally considered to be trustworthy and reliable, since they have no reason to contrive this information. The — thereafter, that is what cause the initiation of the surveillance.

Now, the evidence in the surveillance — the objective evidence that has been unrefuted, which would appear to an experienced and trained officer — and I think we have to view this in that sense, that those are experienced and trained officers that are viewing the activities upon which they rely. You have — you have described, for example, the very unusual — well, one fact that is not explained, we have a very unusual circumstance of a person who checks into a hotel from another state, from Florida, suddenly has access to three different automobiles in the immediate vicinity. He comes in in one vehicle that is rented, he is later seen entering another vehicle, the Audi, from which he is removing packages that he then moved to the Chrysler. Now, this is hardly the type of conduct that a casual citizen — a casual traveler, would be expected to engage in. It is, to a highly trained law enforcement agent, suspicious conduct. Keep in mind that they're already alerted that these — by the hotel people, that these are people that meet the criteria in several different respects, with respect to that profile. Now, that's just one item.

Now, it's well known, now, and well testified about, and certainly police officers and law enforcement agents are expected to know, that narcotics traffickers are reluctant to use

the telephone which creates a paper record, and it is not uncommon or unusual for persons involved in narcotics trafficking to be using the public telephone, despite the fact they have access to private telephones. It is also a common characteristic for narcotics traffickers to resort to the beeper as a means of avoiding the detection, which occurs when using the telephone. All three of these elements are found in this case and are known to the officers.

There is the matter of this erratic driving that is unexplained; for example, they testified that Mr. Ochoa drives from the hotel, which is located apparently adjacent to this Costa Mesa Shopping Center, drives his vehicle from the hotel parking lot to a parking structure, this is apparently on the shopping center property, and does not park there at all, but merely goes through the parking structure and exits again, and then drives on to the parking lot structure — the parking lot. They could reasonably believe, I think, that this driving is erratic, suspicious, and has the characteristic of attempting to avoid surveillance, so the — now, we have the strange circumstance of Mr. Ochoa, as I say, having access to three different vehicles, so he just arrived that day, or the day before from Florida in a Cougar that was rented, he was seen driving this Chrysler, and he has access to the Audi from which he removes two packages, and keep in mind that this is following on the heels of the meetings he had with these other people in the shopping center; the telephone calls that are being made from the public telephone, the use of the beepers, the apparent anti-surveillance type evasive driving that was done, the fact that Mr. Ochoa has access to three different vehicles, and the

fact that he removes from the Audi two packages and transfers them to the Chrysler.

At that point, based upon what these officers had seen, that they had been told, and what they had known, it is the view of the Court that there was probable cause to believe that Mr. Ochoa was involved in narcotics trafficking, and that there was probable cause to search the vehicles since they had probable cause to believe that it contained either narcotics or the fruits of that offense. The agents here relied primarily on their own observations, they did not — and those observations have been unrefuted, and the so-called informants that they relied upon which initiated the investigation, were citizen informants, who are reliable and trustworthy, and it seems to me that this — that there was probable cause, not only to arrest, there was probable cause to search the car under the Supreme Court's decision in California versus Carney. The Spect case, which has been relied on by the defendant has been overruled by United States versus Bagley, and that was based upon the case of California versus Carney. As the search of the case was proper, so was the warrant that was ultimately issued to search the packages found in the car. The affidavit that was submitted, was sufficient to justify the issuance of the warrant, the fact that the dog alert was also included in there, provided additional authorization.

I think that this case illustrates what — that the participation of citizens, at the request of the police to be on the alert for illegal activities, is a technique that bears fruit in some instances. It appears through the alertness of the hotel employees, the police were alerted to suspicious — what they

consider — what the hotel people consider suspicious individuals meeting the criteria as contained in the alert, and police, then, by their own observations, established, through objective evidence, not subjective, that the conduct — that there was probable cause to believe that Mr. Ochoa was involved in committing an offense, or has committed one and, therefore, the actions under all the circumstances of the case, was justified. And in dealing with the totality of the circumstances test, of Gates versus Illinois, of course, the Court takes the selective observations of these officers which was transmitted over the radio from one to the other, were sufficient.

Therefore, the Court denies the defendant's motion to suppress for the reasons stated by the Court, as reflected in the Court Reporter's notes.

Anything further, gentlemen?

MR. CZULEGER: Not on behalf of the government.

Thank you for your time, your Honor.

MR. ENGEL: Your Honor, there's only one facet that I'm sure of, and that, I understand that you said as to the motion to suppress, however, there is an independent ruling which I think the Court must still make a Finding of Fact and Conclusion of Law, and that is whether the evidence was held for an unusual long time, based upon the cases which have come out and said that over 90 minutes is too long to hold the evidence without a search warrant being issued. And in that respect, we have made that motion before the Court, and we have not gotten a ruling, and I would like to

UNITED STATES DISTRICT COURT
FOR THE
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA VS. Two boxes, one measuring approximately 18 3/4" x 12 1/2" x 11" and number two measuring approximately 16 1/2" x 10 1/4" x 10 1/2". Both are wrapped in a multi-colored striped paper and scotch tape.	)	DOCKET NO. SA85-5399M CASE NO. SEARCH WARRANT

To

Affidavit(s) having been made before me by N. Dennis Stevens that he has reason to believe that {on the premises known as}

Two boxes, one measuring approximately 18 3/4" x 12 1/2" x 11" and number two measuring approximately 16 1/2" x 10 1/4" x 10 1/2". Both are wrapped in multi-colored striped paper and scotch tape.

in the Central District of California

there is now being concealed certain property, namely Cocaine, a controlled substance, and/or United States currency, the proceeds of cocaine trafficking.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of ten (10 days (not to exceed 10 days) the person or place names for the property specified, serving this warrant and making the search {in the daytime (6:00 a.m. to 10:00 p.m.) at any time in the day or night*} and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before _____ as required by law.

Dated this 9 day of July, 1985

_____

Judge, (Federal or State Court of Record) of Federal Magistrate

UNITED STATES DISTRICT COURT
FOR THE
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA VS. Two boxes, one measuring approximately 18 3/4" x 12 1/2" x 11" and number two measuring approximately 16 1/2" x 10 1/4" x 10 1/2". Both are wrapped in a multi-colored striped paper and scotch tape.	)	CASE NO. SA85-5399M AFFIDAVIT FOR SEARCH WARRANT

BEFORE Ronald Rose

The undersigned being duly sworn deposes and says:

That he has reason to believe that {on the premises known as}

Two boxes, one measuring approximately 18 3/4" x 12 1/2" x 11" and number two measuring approximately 16 1/2" x 10 1/4" x 10 1/2". Both are wrapped in multi-colored striped paper and scotch tape.

in the Central District of California

there is now being concealed certain property, namely Cocaine, a controlled substance, and/or United States currency, the proceeds of cocaine trafficking.

which are evidence of a violation of Title 21, United States Code, Sections 846 and 841(a) (1)

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

(SEE ATTACHED AFFIDAVIT WHICH IS INCORPORATED AS PART OF THIS AFFIDAVIT FOR SEARCH WARRANT)

AFFIDAVIT OF N. DENNIS STEVENS

I, N. DENNIS STEVENS, being duly sworn, depose and say:

1. I am a Special Agent (SA) of the Drug Enforcement Administration (DEA). I have been employed by DEA since its formation in 1973; and for three years preceding that, I was a Special Agent for the United States Customs Agency Service.

2. This affidavit is made in support of an application for a search warrant to search two boxes which are in the custody of the Santa Ana P.D. The boxes are described: #1 approximately 18 3/4" x 12 1/2" x 11" and #2 approximately 16 1/2" x 10 1/4" x 10 1/2". #1 has been numbered 1 and initialed by myself. I also marked the second box as #2 and initialed it. Both are wrapped in multi-colored wrapping paper and scotch tape.

3. At approximately 6 a.m. on 7-9-85, I traveled to the Westin Hotel, South Coast Plaza. This I did at the request of my supervisor, Francis L. Briggs. Upon my arrival, I joined a surveillance team comprised of officers of the Santa Ana Police Department, Narcotic Detail, and Special Agent Briggs.

4. On 7-9-85, I was briefed by Detective Henry Cousin, Santa Ana Police Department. Detective Cousin told me that on 7-8-85 as a result of a telephone call he went to the Westin Hotel, South Coast Plaza. There he met with an employee of the hotel who said that two suspicious males had registered using the names Jesus Ochoa and Ivan Giraldo. The informant told Detective Cousin that the behavior of these two closely matched the behavior pattern that Detective Cousin had previously given to the informant as being that of the

Colombian cocaine traffickers. The informant told Detective Cousin that both Ochoa and Giraldo arrived without reservations, without luggage, using Florida identification. The informant described Ochoa as a well-dressed Latin driving what appeared to be a rented car. He registered to room #605 until 7-12-85. The informant said that shortly Giraldo came to the hotel and wished to register. Upon being told there might not be any rooms available, he became indignant and persisted in requesting a room. He returned about a half-hour later and was given rooms 628 and 728, until 7-10-85. Detective Cousin informed me that he conferred with his supervisor, Sgt. Alex Paulsen, and with Francis L. Briggs, and that it was their opinion that a surveillance of these two suspects might prove fruitful.

5. On 7-9-85, I was told by Detective Henry Cousin that at approximately 9:35 a.m. on that day he observed a male Latin, who was later identified as Jesus M. Ochoa, leave the Westin Hotel, Santa Ana, California. Detective Cousin said he followed Ochoa across the street where he was informed that Detective Dan Beaumarchais would continue the surveillance. On 7-9-85, I was told by Detective Dan Beaumarchais that he did continue the surveillance of Ochoa. He followed Ochoa into the South Coast Plaza shopping mall and observed Ochoa make approximately ten (10) telephone calls using the public phone. Detective Beaumarchais said that Ochoa would make a call then appear to wait for a number to be printed out on a pager he had with him. Detective Cousin informed me that he observed Ochoa return to the hotel at approximately 10:30 a.m.

6. At approximately 10:40 a.m., I was informed via radio

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that both suspects had departed the hotel and gone across the street to the South Coast Plaza Shopping Mall. I was informed by radio that Ochoa was driving a white Mercury Cougar and that Giraldo and a third suspect were in a silver-colored Chrysler Towncar. I located the Chrysler in the parking lot and established surveillance at it. I have since been informed by Detective Kevin Brown that at about this time he observed the three suspects meeting in a coffee shop inside the Mall. He said that after about ten minutes they got up and walked around the Mall often looking behind them. Shortly, I observed Ochoa and third suspect in the Chrysler. The third suspect has since been identified as Jose Galindo. I observed Ochoa behind the wheel and Galindo in the passenger seat drive north through the Mall lot to the area adjacent to Sears. The vehicle stopped, and I lost sight of it. I have since been told by Detective Beaumarchais that he observed Ochoa go to the trunk of the car at this point and briefly open it. Detective Beaumarchais observed Ochoa and Galindo separate. I then followed Ochoa who walked leisurely around Sears often looking behind himself. He returned to the east side of the building and met with Galindo. I then saw Ochoa placing another call from a public phone next to Sears. Ochoa was then lost from my view. After about ten minutes, I saw Ochoa returning on foot to the silver Chrysler. He came from the west. I saw him enter the Chrysler and drive west through the parking lot to the far side of Sears. He then parked and exited the car. Detective Beaumarchais told me that at this point he saw Ochoa go to the trunk of the vehicle next to the Chrysler. This was a brown Audi. Detective Beaumarchais told me that Ochoa opened the

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trunk of the Audi and removed two boxes, then closed the trunk. Ochoa then opened the trunk of the Chrysler and placed the boxes inside.

7. At this point, the surveillance team approached Ochoa and I identified myself to him. He was advised that he was under arrest. I asked Ochoa who was driving the Audi. He told me that he did not know. I asked him who was driving the Chrysler and he said he did not know. When I asked Ochoa about the keys to both cars, which he had, he said he spoke only a little English. I then asked Special Agent Martinez to question Ochoa in Spanish. This he did and he told me that Ochoa wanted to speak with an attorney. Questioning was, therefore, discontinued.

8. I have since examined a copy of a Budget Rental Agreement #2060509. It shows that the silver Chrysler, CA license #1MBN136, was rented to Daniel C. Heitman on 7-7-85 in Santa Ana, California. On 7-9-85, I was told that he caused a search to be made of DEA records for data on Heitman. He told me that Heitman is of record with DEA as a suspected heroin and cocaine dealer from Louisiana.

9. Special Agent Francis Briggs has told me that he searched the Chrysler and found approximately $80 in quarters in the glove box and in Ochoa's jacket.

10. On 7-9-85, Investigator Don Lambert, Orange County S.O. came to the Santa Ana Police Department and met with me. He brought along his dog, Winston, who is trained in detecting narcotics. After examining a room in which the two boxes were located, Investigator Lambert informed me that Winston had alerted to both boxes. Investigator Lambert gave

me a two page declaration about Investigator Lambert's and Winston's expertise in narcotics detection. I have read this declaration and have attached it to my affidavit.

11. In my experience, I have discerned that high-level Colombian cocaine traffickers often use pagers so that their associates can be called back at public phones. This is done to avoid using phones which might be tapped by State and Federal Authorities. I have in my 16 years of experience learned that Colombian cocaine traffickers, therefore, carry large amounts of coin for the phones and avoid using telephone credit cards. They also rarely use hotel phones, but will seek out pay phones in highly populated areas.

12. Based upon the foregoing, it is my belief that the two boxes removed from the silver Chrysler do contain cocaine and U.S. currency which was acquired by these individuals through illicit cocaine trafficking.

"Winston" is a Narcotics Detector Canine. Investigator Lambert, your affiant, is "Winstons" handler. Both are employed by the Orange County Sheriff's Department, County of Orange, California. "Winston" has been employed since August 1982, 35 months. His handler is a Deputy Sheriff-Investigator, has been employed for the past 17 years.

"Winston" received approximately 208 hours of formal training in Narcotics Detection at MANDELYN KENNELS, Bakersfield, California. His handler received approximately 160 hours of formal training in Police Canine and Narcotics Detector Canine handling with "Winston" at MANDELYN KENNELS. "Winston" and his handler have returned to MANDELYN KENNELS for formal refresher and maintenance training classes each year since graduation from the school.

Since graduation from the school, "Winston" and his handler have participated in approximately 444 hours of training sessions and demonstration searches. The training consisted of building, vehicle, boat, airplane and random luggage and package searches. In the building, vehicle, and airplane searches the drug and narcotic training aids were hidden and "Winston" had to find them. With the luggage and packages, the training aids were hidden in a piece of luggage or a package and placed among others. "Winston" has always found the aids, never giving a false alert or missing any of the aids, except when the handler didn't direct him to the area so he could pick-up the scent.

"Winston" and his handler have participated in 253 searches in the County of Orange, of houses, businesses,

boats, luggage, packages, and aircraft, in which he has been instrumental in the seizures of Heroin, Cocaine, Marijuana, Hashish, Hash Oil, Look-Alike drugs, and money.

His handler has been employed by the Orange County Sheriff's Department since 1968. He has participated in excess of 150 controlled substance investigations, and has participated in the arrests of over 150 persons for violation dealing with Heroin, Cocaine, Marijuana, PCP, LSD, amphetamines, and barbiturates. He has successfully completed formal training in Narcotics and Dangerous Drugs at the Orange County Sheriff's Basic Academy, Advanced Academics, California Department of Justice, and Fullerton College. He has successfully completed a 160 hours course in Police Canine and Narcotics Dog Handling at MANDELYN KENNELS, Bakersfield, California.

CITY OF SANTA ANA
POLICE DEPARTMENT
24 CIVIC CENTER PLAZA • P.O. BOX 1981
SANTA ANA, CALIFORNIA 92701

CRIME ALERT

The Santa Ana Police Department, in conjunction with the United States Customs Service and Federal Drug Enforcement Administration, is requesting the assistance of motels and hotels in the City of Santa Ana.

Over a period of the past two or three years, the Southern California area has been inundated by persons who are smuggling large amounts of a high-quality cocaine from South American countries. A high percentage of the cocaine smuggled into Southern California is coming directly into the City of Santa Ana.

The increased pressure being exerted by law enforcement in the Miami area has displaced a large percentage of smugglers to Los Angeles and Orange Counties. This, in turn, attracts more criminal elements resulting in an increase in homicides, robberies, credit card frauds, etc. Since many of the narcotic transactions take place in hotels and motels, this increases the chances of guests and innocent bystanders being injured during a "dope rip-off" or dispute between narcotic traffickers. It is, therefore, out intent to combat this problem before it takes root here in Santa Ana and reaches the epidemic proportions that it did in Miami.

The purpose of this letter is to make the hotel and motel owners/operators in the City of Santa Ana aware of the potential problem facing the Santa Ana community and the

Orange County area as a whole. Any assistance that you can provide in this area will help us to better serve you and assist you in protecting your property as well as afford protection for your guests. Remember, you are not acting as a police officer but merely a concerned citizen. We are hoping that the following profile will assist you in helping us identify a possible narcotic smuggler.

INDICATORS OF CRIMINAL ACTIVITY

Tenants, male or female, who are:

1. Visiting from the State of Florida or New York, from the country of Mexico or from South American countries such as Columbia, Bolivia, Costa Rica, Brazil, Peru, Ecuador and Panama.

2. Oftentimes speak little or no English.

3. Are well dressed, designer jeans and outfits, and wear expensive jewelry, but their mannerisms are somewhat suspicious.

4. Oftentimes travel alone, rarely travel in pairs.

5. Arrive by taxi or drive cars that display out-of-state license plates. (Often covered with bugs and dirt indicating cross-country driving). Sometimes arrive via airlines (Avianca is a popular airline).

6. After checking into a room usually will immediately make a local or long-distance call: i.e., Miami, Florida, area code 305; New York, area code 212; or an international phone call, i.e. Columbia. Also have numerous incoming calls from those places.

7. Does not appear to be vacationing or have actual business in this area.

8. Any visitor or tenant displaying large amounts of money and/or constantly trying to change large bills.

9. Stays in the room constantly.

10. Constantly refuses maid service.

11. May ask for directions to the hotel from outlying areas.

12. Appears overly concerned with phone service.

13. Indicates only a one or two-day stay when registering and is hesitant to fill out the registration card properly. (obviously phony)

14. The presence of any plastic wrappers containing white or brown powdered substance. Also any large number of toy balloons either empty or filled with such substance or any type of wrapping or weighing devices.

15. Any firearms observed in the room or anything that might indicate the presence of firearms such as loose cartridges or empty handgun holsters.

16. Several persons checking into different rooms on different floors and later joining in one room. Sometimes excessive calls between rooms.

17. Any foot traffic at late and/or unusual hours not consistent with normal guest patterns. Sometimes visitors stay for brief periods of time.

18. Auto license numbers furnished at the time of registration not coinciding with the plates displayed on the vehicle.

19. Any person who attracts your attention as being suspicious for any other reasons than those listed above.

We are facing a problem in Santa Ana which is of major concern to us all and would appreciate any help you can provide in this area. Should you have any questions or information regarding any person fitting this profile, do not hesitate to call the Santa Ana Police Department's Narcotics Detail at 834-4130.

Sergeant Alex Paulsen - 834-4130
Investigator Hank Cousin - 834-4028

(For 24 hour service, please call the Watch Commander at 973-6061 and request that he contact a Narcotics Investigator at home.)

Exhibit 1 p. 19, 20, 21